

ARKANSAS SUPREME COURT

No. CR 06-75

NOT DESIGNATED FOR PUBLICATION

CHAD GONDOLFI
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered September 28, 2006

APPEAL FROM THE CIRCUIT COURT
OF BENTON COUNTY, CR 2001-1125,
HON. DAVID S. CLINGER, JUDGE

AFFIRMED

PER CURIAM

A judgment and commitment order entered May 23, 2003, reflects that a jury found appellant Chad Gondolfi guilty of delivery of a controlled substance, methamphetamine, and sentenced him to 1,200 months (100 years) imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Gondolfi v. State*, CACR 03-1427 (Ark. App. March 9, 2005). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied without a hearing. Appellant now brings this appeal of that order.

Appellant raises two points on appeal. Appellant argues that (1) the trial court erred in holding without a hearing that appellant failed to show prejudice, and (2) his sentence of 100 years is illegal. We find no error in the denial of appellant's petition and affirm the trial court's order.

Appellant first contends that the trial court erred in concluding that appellant had not shown that there was a reasonable probability that the outcome of the trial would have been different if defense counsel had presented certain witnesses to impeach one of the State's witnesses. Appellant

argued in his petition that defense counsel was ineffective because he failed to comply with the rules of discovery, and that failure resulted in the exclusion of these witnesses.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The trial court held that appellant was not prejudiced by trial counsel's failure to present the witnesses. In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Under the criteria for assessing the effectiveness of counsel as set out in *Strickland*, when a convicted defendant complains of ineffective assistance of counsel, he must show first that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

Appellant argues that the trial court had no basis to conclude that there was no reasonable probability that the outcome of the trial would have been different, even had the witnesses been presented. We do not agree that the trial court's finding was baseless. Further, appellant's argument

overlooks that appellant had the burden to plead facts in his petition that show prejudice. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, *i.e.*, that the decision reached would have been different absent the errors. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Greene*, 356 Ark. at 64, 146 S.W.3d at 876. Appellant did not meet his burden to show that the factfinder would have had a reasonable doubt.

Here, appellant had been charged with two counts of delivery of methamphetamine, one on October 15, 2001, and one on October 19, 2001. At trial, the State presented testimony of two police officers and a confidential informant that appellant had come to the informant's apartment while the two officers were present on each occasion. The testimony was that, on the first date, the informant had walked into her bathroom following the appellant. The informant then walked out and gave an officer the drugs, and returned to the appellant, handing him money that the officer had handed her for the drugs. Although the informant testified that she had received the drugs from appellant, the police officers had not observed the appellant hand the drugs to her, and they had not searched the informant to confirm that she had no drugs on her person before she approached appellant.

On the second date, one of the police officers testified that he saw appellant hand the drugs to the informant, that he handed money for the drugs to the informant and saw her hand the money to appellant. The jury acquitted appellant of the delivery count on October 15, 2001, but found him guilty for the count on October 19, 2001. The trial court found that there was no prejudice shown because the jury acquitted appellant on the only charge based solely on her testimony.

We cannot find the trial court was clearly erroneous for concluding appellant had not met his burden to show prejudice. It is apparent that the jury did not find the informant's testimony was credible under the circumstances presented. Because the jury obviously did not find the informant credible on the evidence that was presented, we cannot say that appellant presented any showing as to how he was prejudiced by trial counsel's failure to present further witnesses to impeach the informant's credibility. Although appellant asserts that the jury might somehow have concluded the police officer was not credible if enough witnesses were presented to impeach the informant, he provided no factual basis, or even any logical reasoning, to support that assertion, either in his petition or on appeal. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There was no showing of prejudice from trial counsel's alleged error so as to undermine confidence in the outcome of the trial.

An evidentiary hearing should be held in a postconviction proceeding unless the files and the records of the case conclusively show that the prisoner is entitled to no relief. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). The trial court has discretion pursuant to Ark. R. Cr. P. 37.3(a) to decide whether the files or records of the case are sufficient to sustain the court's findings without a hearing. *Greene*, 356 Ark. at 66, 146 S.W.3d at 877. Because the petition did not contain facts to support a showing of prejudice, the trial court did not abuse its discretion in deciding that no hearing was required.

Appellant contends for his second point of error that his sentence was illegal and that the case relied upon by the trial court in finding that the sentence was not illegal, *Williams v. State*, 292 Ark. 616 S.W.2d. 135 (1987), is no longer, if it was ever, valid, and should be overturned. Appellant was charged under Ark. Code Ann. § 5-64-401(a)(1) (Supp. 2001), which indicates that "for any purpose

other than disposition, this offense is a Class Y felony,” and provides for punishment including imprisonment for not less than ten years nor more than forty years, or life. Appellant’s sentence was enhanced under Ark. Code Ann. § 5-4-501 (Supp. 2001). Section 5-4-501(b)(2) provides that the extended term of imprisonment for a defendant who falls within the statute’s classification is a term of not less than ten years nor more than life for conviction of a Class Y felony, and a term of not less than ten years nor more than fifty years or life for conviction of an unclassified felony punishable by life imprisonment. Appellant contends that his sentence must be reduced to fifty years, asserting that this is the maximum permitted because the conviction was unclassified. Obviously, it is not the maximum, as a defendant may be sentenced to life imprisonment. However, if the sentence is not within the permissible term range, resentencing would be required.

Appellant argues that the decision in *Williams* was in error because disposition means sentencing, and also because the opinion did not adequately consider that under either the enhancement provision for a Class Y felony or that for an unclassified felony, the jury may impose a life sentence. Yet, the opinion does acknowledge the inclusion of a life sentence in each case, and the question before this court was precisely the same as appellant presents here. The opinion did address whether the same language that is at issue in this case requires the range for punishment as a habitual offender be set as for a conviction on an unclassified felony or for a conviction on a class Y felony. The relevant facts were indeed before this court and *Williams* is clearly dispositive of the issue on this point.

This court does not lightly overrule cases and applies a strong presumption in favor of the validity of prior decisions. *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003). It is necessary to uphold prior decisions unless a great injury or injustice would result. *Id.* at 418, 125 S.W.3d at

157. We break with precedent when the result is patently wrong and so manifestly unjust that a break becomes unavoidable. *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004).

Appellant also contends that the legislature has passed legislation that indicates a change in intent which vitiates the holding in *Williams*. He points to Act 192 of 1993, asserting that changes to permit suspension and probation of sentences for controlled substances offenses indicates that the legislature now intends greater leniency regarding those offenses. Yet, the intent expressed in those statutes does not logically extend to the laws concerning habitual offenders and the intent of the legislature in enhancing the sentences of controlled substances offenses under the statutes here relevant. Appellant has not shown reason that *Williams* should be overturned.

As appellant's claim that his sentence was illegal fails, so does his assertion that counsel was ineffective for failing to raise the same argument. Counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). We find no reversible error by the trial court, and therefore affirm the order denying postconviction relief.

Affirmed.

Imber, J., not participating.